(3)

Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

No. 96-642

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JOSEPH A. WAMBAUGH,
Petitioner,

v.

JAY C. SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

Mark R. Hornak
Counsel of Record
Corbett L. Anderson

BUCHANAN INGERSOLL
PROFESSIONAL CORPORATION
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
(412) 562-8859

Counsel for Petitioner

5 pp

No. 96-642

In The
Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH A. WAMBAUGH,
Petitioner,

v.

JAY C. SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

The Petitioner, Joseph A. Wambaugh ("Wambaugh" or "Petitioner"), files this Supplemental Brief pursuant to S. Ct. R. 15.8.[1] There are no parent or subsidiary corporations required to be listed under S. Ct. R. 29.6.

An intervening matter not available at the time of Wambaugh's last filing supports this Supplemental Brief. The colloquy with counsel at the November 13, 1996 oral argument of

[1] The time for Respondent Jay C. Smith to file a Brief in Opposition to Wambaugh's Petition has now expired. In addition, as noted in Petitioner Wambaugh's Petition at 5, the Third Circuit's decision also decided a related case brought on the same grounds by Respondent Jay C. Smith against various state law enforcement officials. The Pennsylvania Office of Attorney General tendered a Petition for Writ of Certiorari one day out of time, and is now engaged in motions practice before this Court regarding those matters. *See John J. Holtz, et al. v. Jay C. Smith*, No. 96-___.

Gary Edwards and Tana Wood v. Jerry B. Balisok, No. 95-1352, revealed this Court's concern for defining when a successful § 1983 action for damages will "necessarily imply" the invalidity of a conviction or sentence under *Heck v. Humphrey*, 512 U.S. 477 (1994).

In *Gary Edwards and Tana Wood v. Jerry B. Balisok*, No. 95-1352, the question presented was whether *Heck v. Humphrey* bars a § 1983 action by a prisoner challenging disciplinary procedures that would "necessarily imply" the invalidity of the prisoner's loss of good-time credits. Many of the Court's questions to counsel concerned whether success on Balisok's § 1983 action would, in fact, "necessarily imply" the invalidity of his loss of good-time credits. The nature of the Court's questions during the *Balisok* oral argument suggests that this Court may further define the "necessarily imply" element of the *Heck* rule. Petitioner Wambaugh's case presents precisely such an opportunity.

In this case, the alleged prosecutorial misconduct that gave rise to the § 1983 claim brought by Respondent Jay C. Smith ("Smith")—the withholding of potentially exculpatory evidence during Smith's criminal trial—was a purported violation of *Brady v. Maryland*, 373 U.S. 83 (1963). His conviction at that trial was reversed on other grounds by the state supreme court. Smith then challenged in state court whether he could, consistent with double-jeopardy limitations, be retried given the *Brady* violation.

The Third Circuit assumed in this case that had Smith brought his § 1983 action prior to his state court retrial (or resolution of his state court double-jeopardy challenge), success on his § 1983 action would have *necessarily* implied the invalidity of any potential future conviction on the state criminal charges. *Smith v. Wambaugh*, 87 F.3d 108, 113 (3d Cir. 1996). It then held that *Heck* precluded Smith's § 1983 action until the Pennsylvania Supreme Court ultimately barred his retrial on *state* law grounds. *Id.* However, the assumption upon which the Third Circuit based its decision was erroneous.

The federal issues central to Smith's *Brady*-based § 1983 action simply would not have affected Smith's state court retrial. Smith's success in his § 1983 action would not have *necessarily* implied the invalidity of his potential future conviction.

"Prosecutorial misconduct that might be viewed as harassment or overreaching . . . does not bar retrial absent intent by the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982). As a matter of federal law, a *Brady* violation does not *necessarily* bar a retrial because it "may only be characterized as an overzealous effort to gain a conviction from the first jury" and it does not necessarily manifest intent to subvert the double jeopardy clause by creating the need for a second trial. *United States v. Coleman*, 862 F.2d 455, 458 (3d Cir. 1988) (citing cases, including *Oregon v. Kennedy*, 456 U.S. 667 (1982)), *cert. denied*, 490 U.S. 1070 (1989).

As the Third Circuit had previously held, the granting of a new trial, not dismissal, is the presumptive remedy contemplated by *Brady*:

> We do not believe the [double jeopardy] clause may be invoked to supplement the remedies contemplated by *Brady*. . . . The awarding of a new trial to remedy a *Brady* violation insures that the defendant will be able to make full use of the exculpatory evidence during the subsequent proceeding. Additionally, such a limited remedy furthers the societal interest in prosecuting criminal defendants to conclusion.

Id. at 458-59. Thus, in this case the Third Circuit wrongly assumed that a successful § 1983 damages action by Smith, based on the alleged prosecutorial misconduct related to his first trial, would have *necessarily* implied the invalidity of Smith's potential future conviction at retrial. [2]

This point goes to an issue repeatedly raised at oral argument in *Edwards v. Balisok*—when does a § 1983 action for damages "necessarily imply" the invalidity of a conviction? Petitioner Wambaugh contends that the Third Circuit erroneously expanded *Heck* to address potential future convictions, when *Heck* was limited

---

[2] Although this Supplemental Brief is limited to new matter, it is important to note that state law would not have *necessarily* barred Smith's retrial either. *See* Petition for Writ of Certiorari at 18.

to actual conflict with an *outstanding* conviction. Nevertheless, even the Third Circuit's expanded rule was misapplied here, because Smith's success in his *Brady*-based § 1983 action would not have *necessarily* implied the invalidity of Smith's potential future conviction had he been retried in state court.

Respectfully submitted,

Mark R. Hornak
Counsel of Record
Corbett L. Anderson

BUCHANAN INGERSOLL
PROFESSIONAL CORPORATION
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
(412) 562-8859

December 5, 1996